No. 586 15

IN THE

Supreme Court of the United States

October Term, 1940

NEW YORK CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLANT OPPOSING APPELLEE'S MOTION FOR DISMISSAL OF APPEAL OR AFFIRMANCE OF JUDGMENT BELOW

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This brief is submitted in opposition to appellee's motion which in the alternative asks (1) that the appeal be dismissed on the ground that it involved no substantial question; or (2) that the judgment of the Court below be affirmed on the ground that the question involved is so wanting in substance as not to require further argument.

OPINIONS BELOW

The only opinion in this case was that of the Municipal Court of the City of New York (R. 44-57) which has not been reported. The Appellate Term of the Supreme Court of the State of New York affirmed without opinion (R. 68-69).

JURISDICTION

The judgment of the Appellate Term of the Supreme Court of the State of New York was entered on June 28, 1940 (R. 68). Leave to appeal to the Appellate Division of the Supreme Court of the State of New York was denied by the Appellate Term on August 12, 1940 (R. 74) and by the Appellate Division on October 9, 1940 (R. 76). The appeal to this Court was allowed by Mr. Justice Stone on October 11, 1940.

The jurisdiction of this Court was invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1 (43 Stat. 936, 937; 28 U. S. C. §344).

THE ISSUE INVOLVED ON THIS MOTION

The issue involved on this motion is whether the appeal presents this Court with a substantial Federal question within its jurisdiction.

The Federal question here involved is whether Section 143 of the Railroad Law of New York (quoted at p. 5 below), as construed and applied by the state courts below is repugnant to Section 20a of the Interstate Commerce Act (quoted at pp. 3-5 below).

This state law provides that upon the consolidation of railroad corporations the liabilities of constituents shall attach to the consolidated corporation. Section 20a of the Interstate Commerce Act forbids interstate carriers to assume obligation or liability in respect of securities, without the prior approval of the Interstate Commerce Commission; and declares that such assumptions without that approval are void. The state courts below held that upon consolidation the liability of one of appellant's constituents as guarantor of certain securities attached to appellant by virtue of the state law, although appellant is an interstate carrier and the Interstate Commerce Commission never approved its assumption of such liability.

STATUTES INVOLVED

Section 20a of the Interstate Commerce Act, as amended by the Transportation Act of 1920, 41 Stat. 494, § 439 (49 U. S. C. §20a), upon which appellant relies, reads in part as follows:

> "Sec. 20a (1) That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.
>
> "(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this sec-

tion collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * *

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

* * *

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having

first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization.* * *"

Section 143 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49, §143) upon which the appellee relies reads as follows:

"The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it. No actions or proceedings in which either of such corporations is a party shall abate or be discontinued by such agreement and act of consolidation, but may be conducted to final judgment in the names of such corporations, or such new corporation may be, by order of the court, on motion substituted as a party."

STATEMENT

The nature of the case and the rulings of the courts below are fully set forth in appellant's statement as to jurisdiction on appeal filed on October 11, 1940 (R. 82-90). Concisely stated, they are as follows:

This is an action brought by appellee in the Municipal Court of the City of New York to recover from appellant the face amount of five overdue interest coupons upon bonds of the Northern Ohio Railway Company allegedly guaranteed by The Lake Erie & Western Railroad Company. Recovery is sought against appellant on the ground that it is a consolidated railroad corporation, formed in 1923 by the consolidation of The Lake Erie & Western Railroad Company and four other railroad companies (not including the Northern Ohio Railway Company); and that by virtue of Section 143 of the Railroad Law of New York (pursuant to which law, among others, the consolidation was effected) the obligations of The Lake Erie & Western Railroad Company with respect to this guaranty were imposed upon appellant. Appellant, by answer and motion for summary judgment, contended that under Section 20a of the Interstate Commerce Act, to which it is subject, no such guaranty obligation with respect to securities can be assumed by it or imposed upon it in the absence of the express authorization of the Interstate Commerce Commission; and if Section 143 of the Railroad Law of New York be construed to impose such obligation upon the appellant in the absence of such authorization from the Interstate Commerce Commission, it is repugnant to Section 20a of the Interstate Commerce Act and therefore inoperative. The record shows (R. 32) that the Interstate Commerce Commission has never authorized appellant to assume the guaranty obligations here involved.

The Municipal Court held that Section 20a of the Interstate Commerce Act is not applicable to security obligations of constituent railroad corporations imposed upon the consolidated railroad corporation by virtue of Section 143 of the Railroad Law of New York, and that therefore there is no repugnancy between the State and Federal statutes (R. 53-57). Summary judgment was entered for appellee on her motion (R. 58); and this judgment was affirmed on appeal by the highest court of the State in which a review could be had (R. 68).

SUMMARY OF ARGUMENT

Appellee's motion should be denied because:

I. The Federal question presented is substantial. It requires an authoritative determination of the scope of the regulatory authority conferred by the Transportation Act of 1920 (particularly Section 20a of the Interstate Commerce Act) upon the Interstate Commerce Commission with respect to financial burdens of interstate carriers; and the extent, if any, to which the states continue to have legislative authority in this respect.

II. Appellant's contention with respect to the Federal question here involved has not been foreclosed by earlier decisions of this or other courts, as claimed by appellee. On the contrary, such decisions as appear to have any pertinency support appellant's contention.

ARGUMENT

I.

The federal question presented is substantial. It requires an authoritative determination of the scope of the regulatory authority conferred by the Transportation Act of 1920 (particularly Section 20a of the Interstate Commerce Act) upon the Interstate Commerce Commission with respect to financial burdens of interstate carriers; and the extent, if any, to which the states continue to have legislative authority in this respect.

Section 20a(2) (*supra*, p. 3) makes it unlawful "* * * for any carrier * * * to assume any obligation or liability as * * * guarantor * * * or otherwise, * * * in respect of the securities of any other person * * * even though permitted by the authority creating the carrier corporation, unless and until and then only to the extent that upon application by the carrier and after investigation by the Commission of the purposes and uses of the * * * proposed assumption of obligation or liability * * * the Commission by order authorizes such * * * assumption."

Section 20a(11) (*supra*, p. 4) makes any such obligation or liability assumed by a carrier void if authorization for such assumption is not first obtained from the Interstate Commerce Commission.

The appellee contended and prevailed below on the ground that the liability said to be imposed upon the appellant by virtue of Section 143 of the Railroad Law of

New York was not a liability "assumed" within the meaning of Section 20a. The court below held that only voluntary assumptions of liability were within the purview of Section 20a; and that the statutory imposition of liability here involved was not such a voluntary assumption.

The consolidation was voluntary and therefore any liability resulting therefrom under Section 143 would have been assumed voluntarily.

In any event, assumptions by operation of law are as common as voluntary assumptions; and there is nothing to show that Congress in speaking of the assumption of liabilities referred only to voluntary assumptions. Lawyers and judges have always spoken of liabilities imposed by operation of law as being liabilities "assumed" by operation of law. Indeed the New York Court of Appeals has itself characterized the imposition of liability provided for in Section 143 of the Railroad Law of New York as an assumption by operation of law. *Polhemus* v. *Pittsburgh R. Co.*, 123 N. Y. 502, 508 (1890). Similarly, in *Bailey* v. *Railroad Company*, 22 Wall. 604, 630 (1874), this Court, in speaking of an earlier New York statute similar to Section 143 of the Railroad Law stated that by virtue of the statute "the new company formed by the act of consolidation assumed all the obligations of the old company."

The question here is whether or not Congress in making Section 20a applicable to "assumptions" of security obligations intended to include the attempted "attachment" of security obligations by virtue of state statute. A similar question involving "undertakings" arose in *Railroad Commission* v. *Southern Pacific Company*, 264 U. S. 331 (1924), where the Court considered the meaning

of Section 1(18) of the Interstate Commerce Act which provided:

> "* * * no carrier by railroad subject to this Act shall undertake the extension of its line of railroad or the construction of a new line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, * * * of such additional line of railroad, * * *" (41 Stat. 477)

The California State Railroad Commission had ordered the defendant interstate railroads to establish a new union terminal and to construct lines leading to that terminal. No application was ever made to the Interstate Commerce Commission under Section 1(18). This Court held that the California Commission's order was inoperative until the Interstate Commerce Commission acted under Section 1(18).

The facts in the *Southern Pacific* case seem to be squarely analogous to those in the case at bar. There the statute forbade the railroad to "undertake" certain construction without the approval of the Interstate Commerce Commission. Here Section 20a forbids the railroad to "assume" obligations without the authorization of the Interstate Commerce Commission. In each case the duty or obligation of the railroad was imposed by state authority. If the involuntary origin of the duty in the *Southern Pacific* case was not enough to remove it from the exclusive jurisdiction of the federal agency over "undertakings," it follows that the involuntary origin of the present defendants' liability would not remove it from the exclusive jurisdiction of the federal agency over "assumptions" of liability.

Analysis and consideration of the context and purpose of the relevant provisions of the Transportation Act also support appellant's construction of Section 20a. Section 20a is an amendment to the Interstate Commerce Act enacted in the Transportation Act of 1920. A reading of the Transportation Act as a whole, and reference to the matters which it was designed to remedy, leaves no doubt that Congress intended to vest in the Interstate Commerce Commission the exclusive regulatory power to determine in the public interest what financial burdens should be undertaken by interstate carriers. As this Court said in *Railroad Commission* v. *Southern Pacific Company, supra*:

> "The purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate functions is further shown in §439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of §20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds or other evidence of indebtedness and forbids approval unless the Commission shall find that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier and will not impair its ability to perform that service. This is of course *in pari materia* with the restriction of paragraph 21 of §402 [i. e. Section 1(18) of the Interstate Commerce Act] to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties." (p. 347)

If the purpose of the relevant provisions of Section 20a is, as the Supreme Court has said, "to prevent a pos-

sible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties" the statutory prohibition against assumptions of security obligations without leave of the Interstate Commerce Commission must have been intended by Congress to have extended to the liability which it is claimed the appellant here assumed. Certainly the financial ability of interstate carriers to discharge their interstate commerce duties may be affected quite as much by a mass of security obligations imposed upon a railroad by operation of a State statute as by such obligations expressly assumed thereafter.

Related provisions in the Transportation Act with respect to the security obligations of railroads indicate that it was the intent of Congress to give the Interstate Commerce Commission plenary and exclusive powers of regulation over such matters. Section 20a(7) expressly declares the jurisdiction of the Commission to be "exclusive and plenary." Securities issued and security obligations assumed by carriers without approval of the Commission are declared to be "void" even though this may involve hardship to the holders of such securities. Only the issuance of short-term notes maturing within not more than two years and aggregating not more than 5% of the par value of the carrier's outstanding securities does not require prior approval of the Commission; and even as to such short-term notes carriers must keep the Commission promptly and fully informed [Section 20a(9)(10)].

If the security obligations involved in the case at bar are not within the purview of Section 20a, they appear to be the only class of security obligations not brought within the control of the Commission by the statute. It does not seem possible that Congress should have made

provision for such relatively inconsequential security obligations as short-term notes for an aggregate of less than 5% of the carrier's outstanding securities and yet have made no provision whatever for the regulation or control of the much greater security obligations which might be imposed by state laws as a result of consolidations.

Section 20a(2) sets up the factors to be taken into consideration by the Commission upon application for leave to issue or assume security obligations. The Commission must find not only that the transaction is for some lawful object within the carrier's corporate purposes but must also find that it will be "compatible with the public interest," that it is "necessary or appropriate for and consistent with the proper performance * * * of service to the public as a common carrier" and that it will not "impair its ability to perform that service." Given such a broad grant of power with standards so explicitly related to the public interest, we submit that Congress could not have intended that a large class of security obligations, without regard to their effect upon the public interest, should be outside the purview of the statute merely because they were imposed upon the carrier by operation of state statutes.

It would be a mockery for the Interstate Commerce Commission carefully to consider whether a railroad shall be permitted to assume a single security obligation, if without reference to the Interstate Commerce Commission and without being subject to its approval, a group of railroads could be consolidated under state laws and the consolidated railroad be burdened with a mass of security obligations, fixed and contingent, of the weaker roads consolidated. We submit that Congress intended no such result; and Section 20a should not be so construed.

At the time of the consolidation which resulted in the formation of the appellant, there was no other provision of the Interstate Commerce Act under which the Commission could, in such consolidations as that of appellant, have prevented carriers from undertaking security obligations so burdensome as to impair their ability to perform their public duties. The only other section of the Act which might have conferred such jurisdiction was Section 5. But this Court specifically held that the consolidation whereby appellant was created in 1923, was not subject to the jurisdiction conferred upon the Commission under Section 5, because the Commission had not then promulgated its nation-wide scheme of consolidation. *Snyder* v. *N. Y. C. & St. L. R. Co.*, 278 U. S. 578 (1929).

In the appellee's motion papers it is suggested (R. 116-117) that the Commission had the power to and did in fact pass upon the propriety of the imposition of the security obligations here involved when it authorized the appellant, under Section 1(18) of the Interstate Commerce Act, to acquire and operate the lines of its constituents and, under Section 20a, authorized the issuance by the appellant of its stock in exchange for the stock of its constituents. This is simply not so.

In the first place, it does not appear that the security obligations here involved were brought to the attention of the Commission in any way (*Acquisition and Stock Issue by N. Y., C. & St. L. R. R.*, 79 I. C. C. 581 [1923]). Obviously, if the Commission was not apprised of the guaranty, it cannot be said to have approved its assumption by the appellant. It clearly did not specifically authorize the assumption by the appellant of this or any other security obligation of its constituents.

Furthermore, the wisdom of the assumption by the appellant of any security obligations of its constituents was not before the Commission for its consideration. The finding and certificate of the Commission that appellant's acquisition and operation of the lines of its constituent roads was convenient and necessary in the public interest in no way implies an approval of the assumption by or imposition upon the appellant of any security obligations. Indeed, the fact that separate application was made and authority granted, pursuant to Section 20a, for the issuance of stock by the appellant shows that security obligations were not considered in connection with the application for a certificate of public convenience and necessity. The finding of the Commission, under Section 20a, that the issuance of the appellant's stock was for lawful objects within its corporate purposes and compatible with the public interest and necessary and appropriate for the proper performance by it of service to the public as a common carrier certainly involves no finding by the Commission that it would have been "compatible with the public interest" for the appellant to assume the security obligations here involved or any other security obligations of its constituent companies.

The Commission's remarks in *New York, Chicago & St. Louis R. R. Bonds*, 82 I. C. C. 365 (1923), cited in the appellee's motion papers (R. 117) have no significance. The passage quoted is from an opinion rendered by the Commission upon an application made shortly after the consolidation by one of the appellant's constituents for authority to issue certain bonds in accordance with the terms of a mortgage existing prior to the consolidation, and a concurrent application by the appellant for authority to assume liability in respect of those bonds. Since a new

issue of bonds was involved, the Commission had no occasion to pass upon the question of whether the appellant was liable by virtue of state statutes upon security obligations of its constituents existing prior to the consolidation, such as the obligations presently involved. To say that the appellant is vested with the property of the constituent companies "subject to all their debts, obligations and liabilities" is not to say that the appellant has any personal liability for such debts, obligations and liabilities. It is to say only that the appellant acquired the properties of its constituents subject to liens in favor of the creditors of those constituents. Similarly, a purchaser of mortgaged property who acquires it "subject to" the mortgage does not thereby assume a personal liability for the mortgage debt. The mortgagee may enforce the obligation against the mortgaged property, but not against the purchaser personally.

The Commission has, in fact, indicated that it does not believe that by virtue of the state statutes personal liability was imposed upon appellant in respect of security obligations of its constituents. Several years after the consolidation, the Commission, on application, granted appellant authority to assume various other such obligations. (See, for example, *New York, C. & St. L. R. Co. Assumption of Obligation*, 217 I. C. C. 598 [1936]; *New York, C. & St. L. R. Co. Bonds and Assumption*, 221 I. C. C. 772 [1937].) If the Commission had, at the time those applications were made, adopted the appellee's view, and that of the court below, that the defendant was liable upon such obligations by virtue of state statutes, it would have denied the applications as unnecessary and inappropriate.

These cases, as well as the issuance by the Commission of

the certificate of convenience and necessity (*Acquisition and Stock Issue by N. Y., C. & St. L. R. R.*, 79 I. C. C. 581 [1923]), are a sufficient answer to the suggestion of the Municipal Court (R. 56) that, because the Commission had not assumed jurisdiction of such consolidations under Section 5 of the Interstate Commerce Act, it had left consolidations and their incidents entirely to the jurisdiction of the states. The purely formal attributes of a consolidation were left to state laws, but the cases referred to show that the Commission has recognized its authority and duty to pass on the assumption by consolidated interstate carriers of the security obligations of their constituents.

No question of depriving creditors of constituent companies of their rights and property without due process of law can arise here. Appellee's argument to the contrary (R. 118) lacks merit. The fact is that appellee is really seeking rights additional to those for which she originally contracted. She is seeking in substance to require all the assets of the appellant to respond to her demands. Her contractual rights are limited to recourse only against the assets of one of appellant's constituents, the Lake Erie & Western Railroad. These contractual rights she still possesses. *Railroad Co.* v. *Howard*, 7 Wall. 392 (1868).

To be sure Section 143 of the Railroad Law of New York does provide for the imposition of liability upon consolidated railroad corporations. But such statutes are grounded only upon considerations of convenience to the creditors of constituent corporations; and such considerations must give way to the far greater considerations of national policy involved in Section 20a, of the Interstate Commerce Act—the need for regulation and control of the financial policies of interstate carriers, with a view to preventing the impairment of their ability to perform their public duties.

If Section 20a of the Interstate Commerce Act is construed, as its language plainly requires: that is, as applicable not only to voluntary assumption of security obligations by consolidated interstate carriers, but also to the assumption of security obligations which would be imposed upon such carriers by operation of state law—then the state statute imposing such obligations must, of course, be held invalid as repugnant to Section 20a. This Court and other courts have many times held that state statutes regulating interstate carriers, which are in similar conflict with the policy of Section 20a and other provisions of the Interstate Commerce Act, must yield to the paramount regulatory power of Congress. *New York Central Securities Corp.* v. *United States*, 54 F. (2d) 122 (S. D. N. Y., 1931), aff'd 287 U. S. 12 (1932); *Texas* v. *United States*, 292 U. S. 522 (1934); *People* v. *New York Central R. Co.*, 233 N. Y. 679 (1922); *Whitman* v. *Northern Central Ry. Co.*, 146 Md. 580, 127 Atl. 112 (1924).

II.

Appellant's contention with respect to the federal question here involved has not been foreclosed by earlier decisions of this Court.

This Court has never decided whether or not a state statute imposing liability upon a consolidated corporation for the security obligations of its constituent corporations is repugnant to or in conflict with Section 20a of the Transportation Act.

The appellee claims that *Missouri-Kansas-Texas Railroad Company* v. *Mars*, 278 U. S. 258 (1929) affirming 298 S. W. 271 (Texas, 1927) which reversed 294 S. W. 941 (1927) held such a state statute not to be so repugnant.

The *Mars* case involved a Texas statute which provided that in case of the sale of the property and franchises of a railroad, the property and franchises so purchased should be "charged with and subject to" all subsisting liabilities of the seller for damage to property. The Texas Court of Civil Appeals construed this statute as providing for an assumption by operation of law of such liabilities, and held that the plaintiff must allege in his complaint approval by the Interstate Commerce Commission of the imposition of the statutory obligation. The decision of the Texas Court is therefore a direct holding that Section 20a requires approval by the Commission of an imposition of liability by operation of state law.

This decision was reversed by the Texas Commission of Appeals on a procedural ground and because the Texas statute there examined, unlike Section 143 in the case at bar, imposed no personal liability on the purchaser but merely created a lien on the properties purchased. The United States Supreme Court affirmed the judgment of the Texas Commission of Appeals on the ground that Section 20a involves only the assumption of liability on "securities," whereas the plaintiff was suing pursuant to the Texas statute for damages for negligent injury to personal property. In the case at bar, of course, the question clearly involves "securities." It follows, therefore, that the *Mars* case does not support appellee's contention.

The retention of jurisdiction by this Court in the *Mars* case amply supports its retention here; for the question here presented is not only analogous but is also much closer and more difficult. If the *Mars* case involved a question sufficiently substantial for this Court to retain jurisdiction, *a fortiori* so does the case at bar.

CONCLUSION

For the reasons stated, it is respectfully submitted appellee's motion should be denied.

Respectfully submitted,

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